

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN 23 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
JAMES A. KAY, JR.)
)
Licensee of one hundred sixty)
four Part 90 licenses in the)
Los Angeles, California area)

PR DOCKET NO. 94-147
WT DOCKET NO. 94-147

DOCKET FILE COPY ORIGINAL

To: The Honorable Richard L. Sippel, Administrative Law Judge

REQUEST FOR PERMISSION TO FILE APPEAL

James A. Kay, Jr. (Kay), by his attorneys, respectfully requests permission to file an appeal of the presiding officer's Order released on January 23, 1995, in the above captioned matter. In support of his position, Kay shows the following:

On January 18, 1995, Kay had filed with the presiding officer a request that the scheduling of two events be suspended until the issuance of a further order by the presiding officer. On January 23, 1995, the presiding officer released an Order (the January 23 Order) denying Kay's request. (A copy of the Order is attached hereto for the presiding officer's convenience.)

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On January 20, 1995, Gary P. Shonman, Esq., telephoned undersigned counsel and, in a timely manner, the conference was held which had been required by the presiding officer's Order released on December 22, 1994, and undersigned counsel also supplied Mr. Shonman with the required written information in a timely manner.¹ Remaining at issue is whether a Prehearing Conference should be held on January 27.

In compliance with Section 1.301(b) of the Commission's Rules, 47 C.F.R. §1.301(b), Kay respectfully shows that permission should be granted to file an appeal of the January 23 Order because new or novel questions of law are presented by the Order and the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception. The presiding officer made two rulings which present such questions.

The Order held that

there will be no relief granted based on a request that is submitted in letter form and that fails to comply with the Commission's rule on pleadings. 47 C.F.R. §1.44(e) (any request to stay an order shall be filed as a separate pleading). See also Action Radio, Inc., 37 F.C.C. 2d 351, 353 (1972) (request for relief in adjudicative proceeding in letter form is improper).

While the Commission's Rules governing the specifications as to pleadings may have required something different in 1972 from what the Rules require today, the pleading which Kay filed

¹ Although Mr. Schonman had telephoned undersigned counsel's office on January 13, 1995, and requested of the person who answered the call that he be added to the service list in this proceeding, not until January 20 did he identify himself as representing any party the proceeding. Accordingly, until January 20, undersigned counsel had not been under any duty to serve Schonman in the same manner as a party to the proceeding.

complied fully with the current requirements of Section 1.49 of the Commission's Rules, except that the impression was not double spaced. Since, however, it does not appear that any burden was placed on any person by the single spacing of the impression, Kay respectfully submits that the pleading was in substantial compliance with Rule Section 1.49 and entitled to consideration.² Accordingly, the new or novel question presented is whether a pleading which is not double spaced, but which does not appear thereby to have imposed any burden on any person, is in substantial compliance with the Commission's rules on pleadings and entitled to consideration.

Of greater significance to the above captioned matter is the new or novel question of whether a Bureau named as a party to a revocation proceeding is required to file a notice of appearance. The presiding officer based his determination that there is no requirement for Bureau counsel to file a notice of appearance on either an error of law or on a new or novel question of law or policy. While the Order is correct that Rule Section 1.91(c), 47 C.F.R. §1.91(c), refers only to the "respondent" in a revocation proceeding, Section 1.221(e) of the Commission's Rules requires that

in order to avail himself of the opportunity to be heard, any person named as a party pursuant to paragraph (d) of this section shall, within 20 days of the mailing of the notice of his designation as a party, file with the Commission, in person or by attorney, a written appearance in triplicate, stating that he will appear at the

² The presiding officer cited additional bases for denying the relief requested by Kay. Accordingly, were the presiding officer to determine on his own motion that he would not have denied the relief solely on the basis of non-compliance with the Commission's rule on pleadings, it might not be necessary to consider further the question of whether the pleading was in substantial compliance with the applicable rule.

hearing. Any person so named who fails to file this written statement within the time specified, [sic] shall, unless good cause for such failure is shown, forfeit his hearing rights,

47 C.F.R. §1.221(e). Rule Section 1.221(e) provides no exception to its clear requirement for a person who holds the position of Chief of a Bureau and who is named as a party by the Commission. In the most recently reported proceeding in which the Private Radio Bureau sought revocation of a Private Radio Services license, Capitol Radiotelephone, Inc., _____ FCC Rcd. _____ (1994), the Private Radio Bureau demonstrated that it recognized that Rule Section 47 C.F.R. §1.221(e) requires the Chief of a Bureau named as a party to a revocation proceeding to file a notice of appearance within the specified time. As shown by the Chief, Private Radio Bureau's Notice of Appearance filed in the Capitol Radiotelephone, Inc. matter, a copy of which is attached as Exhibit I hereto, the Bureau not only acknowledged the requirement of Rule Section 90.221(e), but complied with requirement.³

Whether a Bureau, or the Chief thereof, which is named by the Commission as a party to a revocation proceeding is required to file a timely notice of appearance appears to be a new or novel question of law or policy⁴ which would be outcome determinative in the instant matter.

³ In the January 20 conference, Shonman informed undersigned counsel that W. Riley Hollingsworth also holds the position of Bureau counsel in the instant proceeding. The presiding officer may take official notice that Hollingsworth was one of two counsel representing the Private Radio Bureau in Capitol Radiotelephone, Inc., and, accordingly, is on record as having acknowledged the duty imposed on a Bureau pursuant to Rule Section 1.221(e).

⁴ Undersigned counsel's review of reported cases found no case in which the issue had arisen.

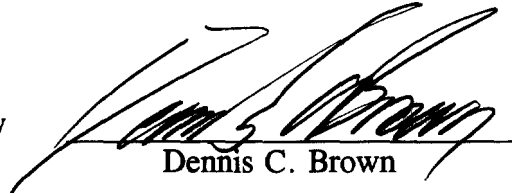
Were the presiding officer to have been in error, the error would clearly require remand of the proceeding if the issue were taken as an exception. Any such remand would occur only after the completion of trial type proceedings, which it might be possible to avoid entirely by granting permission for the filing of an interlocutory appeal at this time.

Conclusion

For all the foregoing reasons, Kay respectfully requests permission to file an interlocutory appeal of the January 23 Order.

Respectfully submitted,
JAMES A. KAY, JR.

By



Dennis C. Brown

Brown and Schwaninger
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006
202/223-8837

Dated: January 23, 1995

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95M-16

In Matter of)	WT DOCKET NO. 94-147
)	
JAMES A. KAY, JR.)	
)	
Licensee of one hundred sixty)	
four Part 90 licenses in the)	
Los Angeles, California area.)	

O R D E R

Issued: January 19, 1995 ; Released: January 23, 1995

A Prehearing Conference was set in this case for January 27, 1995, by the assignment order of the Chief Judge (FCC 94M-652). There the parties were "put on notice that they are expected to be fully cognizant of Part I of the Commission's Rules and Regulations concerning Practice and Procedure." [47 C.F.R. §1.1 et seq.]

On December 20, 1994, the Presiding Judge issued an Order which established procedures for the Prehearing Conference (FCC 94M-653, released December 22, 1994). On January 18, 1995, counsel for James A. Kay, Jr. ("Kay") submitted a letter to the Presiding Judge¹ complaining that the Bureau has not filed a notice of appearance and requesting to be excused from conferring with Bureau counsel on January 20, 1995, in preparation for the conference. Kay also asks through counsel's letter that the Prehearing Conference of January 27, 1995, be suspended.

There will be no relief granted based on a request that is submitted in letter form and that fails to comply with the Commission's rule on pleadings. 47 C.F.R. §1.44(e) (any request to stay an order shall be filed as a separate pleading). See also Action Radio, Inc., 37 F.C.C. 2d 351, 353 (1972) (request for relief in adjudicative proceeding in letter form is

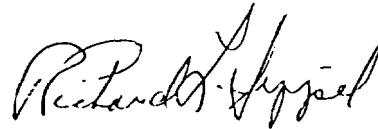
¹ Copies were served on the Director and Deputy Director of the Wireless Telecommunications Bureau (by hand) and on a trial attorney (by mail). Counsel for Kay should ascertain immediately who the persons are who will be representing the Bureau at the Kay hearing sessions and Kay should prepare his service list accordingly. See 47 C.F.R. §1.47(c) (Commission counsel who formally participate in proceeding shall be served in same manner as other persons who participate in proceeding).

improper).² It is also noted that the requirement for filing a Notice of Appearance applies only to "respondents". 47 C.F.R. §1.91(c). There is no requirement for Bureau counsel to comply with that procedure.

Accordingly, IT IS ORDERED that the informal request of James A. Kay, Jr. by letter dated January 18, 1995, for suspension of the Prehearing Conference set for January 27, 1995, and for related relief, IS DENIED.

IT IS FURTHER ORDERED that the parties shall continue to prepare for and shall attend and participate in the Prehearing Conference set for January 27, 1995, in accordance with procedures set by the Presiding Judge.³

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Richard L. Sippel", is written over a horizontal line.

Richard L. Sippel
Administrative Law Judge

² Also, there has not been an adequate showing of a hardship that would justify suspending a Prehearing Conference.

³ The parties were advised telephonically that copies of this Order were available to be picked up at the Presiding Judge's office on the date of issuance.

EXHIBIT I

SEP 20 1993

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of)

Application of)

Capitol Radiotelephone Inc.)
d.b.a. Capitol Paging)
1420 Kanawha Blvd. E.)
Charleston, West Virginia 25301)

PR Docket No. 93-231

For a Private Carrier Paging Facility)
on the Frequency 152.480 MHz in)
Huntington/Charleston, West Virginia)

and)

Imposition of Forfeiture Against)

Capitol Radiotelephone Inc.)
d.b.a. Capitol Paging)
1420 Kanawha Blvd. E.)
Charleston, West Virginia 25301)

Former Licensee of Station WWSX-646)
in the Private Land Mobile Radio)
Services)

and)

Revocation of License of)

Capitol Radio Telephone Inc.)
d.b.a. Capitol Paging)
1420 Kanawha Blvd. E.)
Charleston, West Virginia 25301)

Licensee of Station WWSA-400 in the)
Private Land Mobile Radio Services)

and)

Revocation of License of)

Capitol Radio Telephone Inc.)
d.b.a. Capitol Paging)
1420 Kanawha Blvd. E.)
Charleston, West Virginia 25301)

Licensee of Station WWSW-636 in the)
Private Land Mobile Radio Services)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

and)
)
Revocation of License of)
)
Capitol Radiotelephone Company, Inc.)
1420 Kanawha Boulevard East)
Charleston, West Virginia 25301)
)
Licensee of Station KNU-373 in the)
Public Mobile Radio Service)
)
and)
)
Revocation of License of)
)
Capitol Radiotelephone Company, Inc.)
P. O. Box 8305)
South Charleston, West Virginia 25303)
)
Licensee of Station KUS-223 in the)
Public Mobile Radio Service)
)
and)
)
Revocation of License of)
)
Capitol Radiotelephone Co., Inc.)
1420 Kanawha Boulevard East)
Charleston, West Virginia 25301)
)
Licensee of Station KQD-614 in the)
Public Mobile Radio Service)
)
and)
)
Revocation of License of)
)
Capitol Radiotelephone Company, Inc.)
1420 Kanawha Boulevard)
East Charleston, West Virginia 25301)
)
Licensee of Station KNU-204 in the)
Public Mobile Radio Service)

To: The Honorable Joseph Chachkin, Administrative Law Judge

NOTICE OF APPEARANCE

The Chief, Private Radio Bureau, by his attorneys and pursuant to
Section 1.221(e) of the Commission's Rules, 47 C.F.R. § 1.221(e), hereby
enters his appearance in this proceeding and gives notice of his intention to

appear on the date fixed for hearing and to present evidence on all issues designated for hearing in this proceeding.

Respectfully submitted,

CHIEF, PRIVATE RADIO BUREAU

By: John J. Borkowski
John J. Borkowski

W. Riley Hollingsworth
W. Riley Hollingsworth

His Attorneys

September 20, 1993

CERTIFICATE OF SERVICE

I, Shelia Foster, a secretary with the Private Radio Bureau, hereby certify that on this 20th day of September, 1993, copies of the foregoing Notice of Appearance were served, by first-class U.S. mail, upon the following:

Hon. Joseph Chackin *
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W.
Room 226
Washington, DC 20554

Kenneth E. Hardman, Esq.
1255 23rd Street, N.W.
Suite 830
Washington, DC 20037

T. D. Kauffelt
803 Kanawha Valley Building
P. O. Box 3082
Charleston, WV 25331

Frederick M. Joyce
Joyce & Jacobs
2300 M Street, N.W.
Suite 130
Washington, DC 20037



Shelia Foster

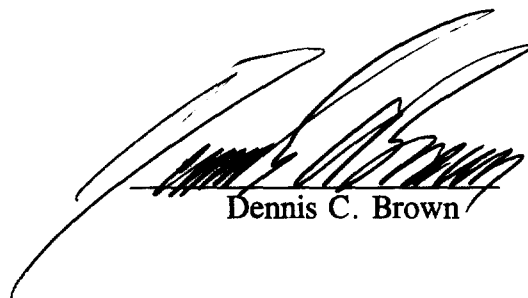
* denotes hand delivery

CERTIFICATE OF SERVICE

I hereby certify that on this twenty-third day of January, 1995, I served a copy of the foregoing Request for Permission to File Appeal on each of the following persons by causing to be delivered to their offices a copy thereof:

Gary P. Schonman, Attorney
Federal Communications Commission
Hearing Branch
Mass Media Bureau
Suite 7212
2025 M Street, N.W.
Washington, D.C. 20554

W. Riley Hollingsworth*
Deputy Associate Bureau Chief
Office of Operations
Federal Communications Commission
1270 Fairfield Road
Gettysburg, Pennsylvania 17325



Dennis C. Brown

* By regular mail